

## **VII. DRAFT WILLS THAT PROTECT CLIENTS' INTERESTS**

### **A. Select the Vehicle that Meets Clients' Needs**

An attorney must examine the circumstances of each individual to determine the appropriate vehicle or vehicles to use in order to transfer property upon death. Property can be transferred in several ways: by completing beneficiary designations on life insurance, annuities, and IRA's; by holding property as joint tenants; by will; and by various types of trusts.

The attorney should analyze the following questions before deciding on the correct vehicle or combination of vehicles to use for each client:

- Can the property be passed through a beneficiary designation form?
- Is the client's estate likely to be smaller than \$100,000?
- Does the client own real property?
- Is any of the real property commercial or investment property?
- Does the client want to manage his or her assets during life?
- Does the client have minor children?
- Are any of the children disabled?
- Is the client married?
- Is the client's estate over the estate tax threshold?

The aforementioned questions are only a few of the questions that must be discussed before an attorney advises a client as to the best vehicle to use.

## **B. The Statutory ABC's: What is Required**

While the requirements to sign a will are few, the requirements are very strict and must be met exactly for a will to be valid. The testator must have the capacity to execute a will. Capacity consists of two parts: 1) the testator must be at least 18 years old; and 2) the testator must be of sound mind and memory. A testator is of sound mind and memory if he or she knows the property that he or she will leave in the will and the natural objects of his bounty (his or her heirs).

The statute also requires that the will be in writing. An oral will is not valid in Illinois. However, the will may be handwritten or typed. Additionally, the testator or someone in his or her presence and by his or her direction must sign the will. A handwritten will only signed by the testator (a holographic will) is not valid in Illinois. Two or more credible witnesses must attest a will in the presence of the testator. These witnesses verify the testator's intent and soundness of mind. Any person at least 18 years old who is not receiving any property under the will is a credible witness. An individual receiving property under the will may sign as a witness as long as at least 2 other credible witnesses attest the will as well. If an individual receiving property under the will attests the will and less than two other credible witnesses attest the will, then the provision passing the property to the individual who was a witness is invalidated as to that person. However, that individual is entitled to receive the amount of property he or she would have received through intestacy.

## **C. De-Mystify the Laws of Intestacy**

### **755 ILCS 5/2-1: Rules of descent and distribution**

When an individual dies without a will the Illinois Probate Act delineates how the deceased individual's real and personal property is to be distributed after all claims against the estate are paid. The distribution is contingent on which family members survive the decedent and is as follows:

(a) If there is a surviving spouse and descendants (such as children), half of the entire estate will go to the surviving spouse and the other half will be equally divided among the descendants, per stirpes. In a per stirpes distribution, the share that a person who predeceases the decedent was entitled to passes in equal shares to his or her descendants.

(b) If there is no surviving spouse, the estate is divided equally among any descendants, per stirpes.

(c) If there is a surviving spouse, but no descendants, the entire estate passes to the surviving spouse.

(d) If there is no surviving spouse or descendant, but a parent, sibling or a descendant of a sibling survives, the estate is equally divided among the parent(s) and sibling(s). If there is only one remaining parent, the surviving parent takes a double share of the estate. If a sibling of the decedent has predeceased the decedent, but left surviving descendants, the sibling's descendants will receive the sibling's share of the estate in equal amounts, per stirpes.

(e) If there is no surviving spouse, descendant, sibling, niece or nephew, but a grandparent or a descendant of a grandparent survives, half of the estate will be given to the surviving maternal grandparents or if they predeceased the decedent, their descendants per stirpes, and the other half to the surviving paternal grandparents or if they predeceased the decedent, their descendants per stirpes. If no grandparents or descendants of the grandparents on one side of the family survive the decedent, the entire estate will be given to the other set of grandparents if they survive decedent, or else their surviving descendants in equal shares, per stirpes.

(f) If none of the aforementioned people survive the decedent, half of the estate will be distributed to the surviving maternal great-grandparents or if they predeceased the decedent, their descendants per stirpes, and the other half to the surviving paternal great-grandparents or if they predeceased the decedent, their descendants per stirpes. If no great-grandparents or descendants of the great-grandparents on one side of the family survive the decedent, the entire estate will be distributed to the other set of great-grandparents if they survive decedent, or else their surviving descendants in equal shares, per stirpes.

(g) If none of the aforementioned relatives survive the descendant, the entire estate passes in equal parts to the nearest kindred, without representation. The nearest kin is the relative with the closest degree of consanguinity. The closest degree of consanguinity is determined by counting up the number of generations from the decedent to the closest ancestor that the decedent and a possible nearest kin have in common. Then, count down by generations to the possible nearest kin. The nearest kin to the decedent is the individual with the lowest number of generations counted.

The term without representation is the opposite of a per stirpes distribution. The descendants of an individual who predeceased the decedent do not receive that individual's share. Each person who has an equal degree of kinship to the decedent splits the entire estate equally.

(h) If there is no surviving spouse or known surviving kindred, any real property escheats to the county in which it is located. Personal property located in the state of Illinois and personal property located out-of-state, but subject to ancillary administration in Illinois, escheats to the county in which the decedent was a resident, or if the decedent was not a resident of Illinois, the property escheats to the county in which the property is located. All other personal property, regardless of type or character, owned by the decedent will escheat to the State of Illinois.

#### **755 ILCS 5/2-2: Children born out of wedlock**

The Probate Act states that the real and personal estate of a resident decedent and the real estate located in Illinois of a nonresident decedent who was child born out of

wedlock will be distributed according to the rules of Probate Act §2-1, and subject to Probate Act § 2-6.5 if both parents are considered eligible parents.

The term “eligible parent” refers to a parent of the decedent who, during the child’s lifetime, acknowledged the decedent as the parent’s child, established a parental relationship with the child and supported the decedent as the parent’s child. However, parents who are behind on more than one year’s child support obligation, even if deemed eligible parents, can not receive any property benefit or other interest from the decedent unless and until a court makes a determination regarding the late child support payment. The parent’s inheritance must be offset by at least the amount owed in late child support at the decedent’s time of death. Although not limited to subsection (1)-(3) of Probate Act §2-6.5, a court may refer to those provisions when making reduced benefit determinations.

If neither parent qualifies as an eligible parent, the property will be divided according to Probate Act § 2-1, with the parents of the decedent treated as though they predeceased the decedent.

If only one parent is an eligible parent, after all claims have been satisfied, subject to the rules in Probate Act § 2-6.5, the estate will be distributed as follows:

(a) If there is a surviving spouse and descendants of the decedent child, half the estate will pass to the surviving spouse and the other half in equal parts to the descendants per stirpes.

(b) If there is no surviving spouse, the entire estate will be equally divided among any descendants, per stirpes.

(c) If there is a surviving spouse but no descendants, the entire estate passes to the surviving spouse.

(d) If there is neither a surviving spouse nor descendants, but an eligible parent or descendant of an eligible parent survives the decedent, half the estate will pass to the eligible parent and the other half will pass to the eligible parent’s descendants, per stirpes.

(e) If there are no heirs from the aforementioned groups, but a grandparent on the eligible parent’s side of the family or descendants of the aforesaid grandparents, the

estate is distributed to the decedent's grandparents on the eligible parent's side of the family if they survive the decedent. If none of the aforesaid grandparents survive the decedent, the estate passes to any descendants of the grandparents on the eligible parents' side in equal parts, per stirpes.

(f) If none of the aforementioned relatives survive the decedent, the estate shall be distributed to the great-grandparents on the eligible parent's side of the family or if no great-grandparent's on the eligible parent's side of the family survive, to their descendants per stirpes.

(g) If no survivor is yet found, the entire estate passes to the nearest kindred in equal degree without representation according to the same rules as in Probate Act §2-1.

(h) If there is no surviving spouse, descendant, eligible parent, or known kindred of the decedent, the estate escheats to the State according to the same rules as in Probate Act § 2-1.

For purposes of inheritance, a child born out of wedlock is considered an heir of his mother, any ancestors maternally related to the decedent, and any person from whom his mother may have inherited, if living. Any descendant of the child born out of wedlock will inherit anything the parent would have received, if living.

If a decedent acknowledged during his lifetime that he was the father of a child born out of wedlock, or if he is found to be the father of a child born out of wedlock by a court, that child will be an heir of the father, any paternal ancestor, and any person from whom his father may have inherited, if living. The descendants of a person who was a child born out of wedlock shall inherit any part of an estate the parent would have taken, if living.

#### **755 ILCS 5/2-3: Posthumous child**

A child born after the decedent's death will receive the same share of the estate as if the child had been born before the decedent's death.

#### **755 ILCS 5/2-4: Adopted Child**

For purposes of the Probate Act, an adopted child is considered a descendant of the adopting parents, and will therefore, be able to inherit from the adoptive parents and

the lineal and collateral kindred thereof. However, if the adopted child is adopted after the age of 18 and never resided with the adopting parent before age 18, the child is deemed a descendant of the adopting parent, but not of the adopting parent's lineal or collateral kindred.

If there is more than one lineal connection to the adoptive parents, the adopted child and any descendants of the adopted child are only entitled to inherit a share based on the relationship which gives the adopted child or the child's descendants the greatest share of the estate. The share to which the child is not entitled shall be divided as if the adopted child or descendant was never born.

An adopting parent and the lineal and collateral kindred of the adopting parent can inherit property from an adopted child to the exclusion of a natural parent, unless it is property originally received from the natural parents or relatives of the natural parents by means of gift, will, or through intestate succession.

For purposes of the Probate Act, a spouse of an adopting parent at the time of the adoption will also be considered an adopting parent. A child is considered an adopted child when so declared by any court or when so declared or assumed by anyone who has given or bequeathed property to the child.

In regard to property rights, an adopted child is not the child or descendant of the natural parents or any of the natural parent's lineal or collateral kindred unless one or more of the following apply:

- 1) The child is adopted by one of the great-grandparent's descendants or his or her spouse. The adopted child is then considered the child of both natural parents;
- 2) The child was adopted after a natural parent died. In this scenario, the adopted child is a descendant of the deceased natural parent and the natural parent's lineal and collateral kindred; or
- 3) A written instrument demonstrates clear and convincing evidence that the adopted child should be regarded as a natural child.

Any heir of an adopted child, who by reason of the above is not a child of the natural parent, may not inherit through the adopted child's natural parents.

All instruments conveying property rights executed on or after September 1, 1955 consider an adopted child as a child born to the adopting parents unless it is shown by clear and convincing evidence otherwise intended in the instrument.

After September 30, 1989, a child adopted at any time before or after this date is considered a child born to the adopting parent to determine property rights under any instrument executed prior to September 1, 1955, unless:

- 1) Clear and convincing evidence is included in the instrument demonstrating the intent to exclude the adopted child;
- 2) The adopting parent did not think the adopted child would be able to receive property from any instrument executed on or before September 1, 1955, and therefore, made substantial gifts to the adopted child based on that assumption.

**755 ILCS 5/2-6: Person Causing Death**

Anyone who intentionally and unjustifiably causes the death of another is not eligible to receive any property, benefit, or interest from the estate, regardless of why he is receiving it or by what method or instrument it is passed. For purposes of inheritance, the property, benefit, or interest passes as if the person causing death predeceased the decedent. If any property is owned jointly between the decedent and the person causing death, the person causing death does not lose his interest in the property. However, the person causing death cannot inherit any interest in the decedent's share of the property.

**755 ILCS 5/2-6.2: Financial Exploitation, abuse, or neglect of an elderly person or a person with a disability**

For purposes of this section, "abuse", "financial exploitation", and "neglect" are defined according to sections of the 1961 Criminal Code. "Financial exploitation" is when a person in a position of trust and confidence knowingly obtains control over another's property through intimidation or deception. "Abuse" constitutes not only acts of physical abuse, but also intimidation, harassment, or actions which endanger another's life or injure one's health. Acts of abandonment and omissions of acts necessary for proper care also constitute abuse when they actually affect the elderly or disabled

person's health. Finally, "neglect", occurs when one negligently fails to provide adequate and sufficient care or maintenance causing physical or mental injury or deterioration.

If one is convicted of financially exploiting, abusing or neglecting an elderly person or person with a disability, the convicted individual is no longer eligible to receive any property or benefit resulting from the injured party's death. The property, benefit, or interest will pass as if the convicted person died before the decedent.

If the convicted individual and decedent jointly owned property together, the convicted person will not lose his or her share in the property possessed prior to the joint tenant's death, but he or she is no longer eligible to receive the interest that would have passed to him or her as a result of the joint tenant's death.

However, a person convicted of exploitation, neglect, or abuse may receive property from an elderly or disabled person if it is demonstrated with clear and convincing evidence that the conveyor of the property knew of the conviction and subsequently expressed his or her intent to give the property to the convicted person anyway.

#### **755 ILCS 5/2-6.5: Parent Neglecting Child**

If a parent willfully neglected or failed to perform parental duties for a period of one year or more immediately before the child's death or willfully deserted the child for a period of one year or more, the neglectful parent will not receive any property or estate benefit, in any capacity, unless and until the court determines otherwise.

The court can make a determination regarding the effect of the neglect on the decedent child for purposes of determining if a reduced amount of what the parent would have been entitled to receive is proper. The reduction will not be less than the amount of child support owed to the minor or dependent child at the time the child died. When calculating the reduced benefit, the court will evaluate the following:

- (1) The deceased child's loss of opportunity resulting from the neglect;
- (2) The effect of the neglect on the deceased child's overall quality of life; and
- (3) The ability of the parent to have avoided neglecting the child.

When an interest in real property exists, that interest may be released, transferred or distributed at any time prior to a court determination made and recorded in the county where the real property is located. The recorded document must include the title of the action or proceeding, the court in which the action was brought, the date the determination was made, the legal description of the property and its permanent index number, and the common address of the real property. Unless a determination is filed, within the requisite 6 months of the decedent's death, property can still be distributed to a neglectful parent.

**755 ILCS 5/2-6.6: Person Convicted of Certain Offenses against the Elderly or Disabled**

If an individual is found guilty of violating Illinois Criminal Code 720 ILCS 5/12-19, 720 ILCS 5/12-21 or 720 ILCS 5/16-1.3, which involves abuse of an elderly or disabled person, the abusing person cannot receive any benefit from the abused decedent's estate. The interest from the estate will pass as if the convicted person had predeceased the decedent. If property is held jointly or through a tenancy by the entirety, any interest therein does not diminish, however, the wrong-doer may not receive an additional benefit or interest in the joint ownership as the result of the decedent's death.

A person convicted of the abovementioned crimes may receive a benefit if it is proved by clear and convincing evidence that the decedent knew of the conviction and subsequently ratified his or her intention to transfer the property.

#### **D. Update On Current and Changing Estate Tax Regulations**

The Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA), Pub.L.No. 107-16, 115 Stat. 38, implemented several changes regarding the taxation of gifts and estates. EGTRRA is due to expire after 2010 and gift, estate, and transfer taxes will revert to the law as it existed in 2001 before EGTRRA, unless Congress takes action to institute new legislation.

Under EGTRRA, the applicable exclusion amount (the amount of personal and real property that can be excluded from estate taxation) for estate tax purposes gradually increases until 2010. Beginning in 2010, the estate tax is repealed. The applicable exclusion amount in 2011 returns to \$1 million, the pre-EGTRRA amount.

<u>YEAR</u>	<u>APPLICABLE EXCLUSION AMOUNT</u>
2006	\$2 million
2007	\$2 million
2008	\$2 million
2009	\$3.5 million
2010	Repealed
2011	\$1 million

In addition, the applicable credit (the tax credit allowed against the estate tax) amount will also escalate until 2010.

<u>YEAR</u>	<u>APPLICABLE CREDIT AMOUNT</u>
2006	\$780,800
2007	\$780,800
2008	\$780,800
2009	\$1, 455,800
2010	Repealed
2011	\$345,000

Under EGTRRA, the estate and gift tax are no longer unified. Unlike the applicable exclusion amount that gradually increases over time, the lifetime gift tax exemption is fixed at \$1 million. The annual gift tax exemption is currently \$12,000 per donor and is adjusted periodically for inflation. The tax basis on property that is gifted during one's life is the lower of the donor's tax basis or the value of the gift. This is called carryover basis or substituted basis. In contrast, a stepped-up basis is used for estate taxation purposes. That is, the tax basis of the decedent's property is stepped up to the fair market value of the property on the date of the decedent's death.

Pre-EGTRRA, the Internal Revenue Code § 2011 set forth the calculation for the credit of state death taxes allowed on the federal estate tax return. EGTRRA reduced the credit for state death taxes by 25% in 2002, 50% in 2003, and 75% in 2004. For years 2005 through 2010, there is no credit for state death tax, but rather a deduction is taken on the federal estate tax form. After 2010, and the sunset of EGTRRA, state death taxes will again become a credit and will follow the table set forth in §2011.

Under EGTRRA, since 2003, the Generation-Skipping Tax ("GST") Exemption mirrors the estate tax exemption. Before EGTRRA, the GST Exemption was set to \$1 million in 1998 and thereafter adjusted for inflation. In 2010, the GST Exemption is repealed, and without further Congressional action, will return in 2011 at an amount reflecting changes in inflation.

Shortly after EGTRRA was enacted, causing the State's revenue from estate taxes to fall short, the Illinois legislature revised the estate tax. Pursuant to 35 ILCS 45/2, decedents dying after January 1, 2003, and through December 31, 2005, the State's estate tax is equal to the full credit for state death taxes under IRC § 2011 or § 2604 without the reduction of or the termination of the State Death Tax Credit provided for in EGTRRA. The estate tax exclusion amount is recognized through December 31, 2005, in the amount of \$1.5 million. Decedents that die after December 31, 2005, and through December 31, 2009, will pay an amount equal to the full credit amount as determined under § 2011 or § 2604 before the enactment of EGTRRA (without the reduction of the State Death Tax

Credit or its termination as provided for in EGTRRA). 35 ILCS 405/2 However, applicable exclusion amount recognized is \$2 million.

The new Illinois estate tax legislation is scheduled to sunset in 2010. During that year, the state of Illinois will not receive any revenue from state death taxes. Beginning in 2011, the Illinois estate tax will return to the amount equal to the State Death Tax Credit as determined under § 2011 or § 2604.

Illinois GST tax is imposed on every taxable transfer of property with a situs in the state of Illinois that results in federal GST taxation. 35 ILCS 405/4 The amount of the tax is the maximum state tax credit allowed with respect to the transfer. The maximum amount allowed as a credit pursuant to IRC § 2604 is five percent of the amount of the GST tax.

## **E. Disinheritance and No Contest Clauses: Will They Stand?**

### **1. Disinheritance of a Spouse or Minor Child**

In general, it is often very difficult to completely disinherit a spouse or minor child in Illinois. For instance, the Illinois Probate Act provides for both a spousal and child allowance to assist a surviving spouse or minor child after the death of an individual. Moreover, Illinois also has an “Elective Share” mechanism whereby a surviving spouse may elect against his or her spouse’s will and receive a forced share of the estate if the deceased spouse’s will fails to adequately provide for the surviving spouse. Finally, a surviving spouse or minor child (through his or her then-acting guardian) may, as any other interested party, challenge or seek to contest the validity of a decedent’s will under a theory of undue influence, lack of testamentary capacity, or other judicially articulated equitable remedy. And, with regard to this final point, in *terrorem* clauses, or “no contest” clauses, added to a will to discourage interested parties from contesting the validity of a will, have been strictly construed in Illinois and very rarely enforced.

A disinheritance clause is simply a provision in a will that deprives a would-be heir of the expectancy to take a portion of the estate. A testator may expressly exclude or

limit the right of a person or a class to inherit property that the person or class would have inherited through intestate succession. However, not only must the testator expressly exclude a person or class of persons by way of a disinheritance clause, but must also make careful provision for the devise of all his or her property to another. In other words, any defective or lapsed legacy not otherwise provided for will be distributed under the laws of descent and distribution without regard to any disinheritance clause in the will.

(i) **Statutory Child's Allowance**

In general, a parent may disinherit a child by disposing of all his or her property upon death to others and making no other provision for the disinherited child. However, without regard to any disinheritance provision in the decedent's will, the Illinois Probate Act provides that a minor or dependent child is entitled to an "allowance" from the decedent's estate if the child does not then reside with a surviving spouse. Specifically,

If a minor or adult dependent child of the decedent does not reside with the surviving spouse of the decedent at the time of decedent's death, there shall be allowed to that child, exempt from the enforcement of a judgment, garnishment or attachment in the possession of the representative, a sum of money that the court deems reasonable for the proper support of the child for the period of 9 months after the death of the decedent, in a manner suited to the condition in life of the minor child and to the condition of the estate. The award may in no case be less than \$5,000 and shall be paid for the benefit of the child to such person as the court directs. 755 ILCS 5/15-2(a).

Moreover,

If a deceased resident of this State leaves no surviving spouse, there shall be allowed to all children of the decedent who were minors at the date of death and all adult dependent children, exempt from the enforcement of a judgment, garnishment or attachment in the possession of the representative, a sum of

money that the court deems reasonable for the proper support of those children for the period of 9 months after the death of the decedent in a manner suited to the condition in life of those children and to the condition of the estate. The award may in case be less than \$5,000 for each of those children, together with an additional sum not less than \$10,000 that shall be divided equally among those children or apportioned as the court directs and that shall be paid for the benefit of any of those children to any person that the court directs. 755 ILCS 5/15-2(b).

In other words, if a minor or adult dependent child of the decedent does not reside with the surviving spouse of the decedent at the time of the decedent's death, such a child is allowed a sum of money that the court considers reasonable for the proper support of the child for a period of nine months after the death of the decedent, in a manner suited to the condition in life of the minor child and to the condition of the estate. The award may in no case be less than \$5,000 and is paid for the benefit of the child to whomever the court directs. Additionally, the amount is free from execution, garnishment or attachment in the hands of the representative.

If the decedent's child is an adult who is a “dependent,” defined as being unable to maintain himself and likely to become a public charge, he must also be given the requisite award under the statute. Degner v. Lane, 164 Ill. App. 3d 959, 518 N.E.2d 400 (1 Dist. 1987).

If a deceased resident of Illinois leaves no surviving spouse, all of the decedent's minor children and adult dependent children at the date of death are to share a sum of money that the court considers reasonable for the proper support of such children for the period of nine months after the death of the decedent in a manner suited to the condition in life of the children and to the condition of the estate. The award may in no case be less than \$5,000 for each minor or adult dependent child, together with an additional sum not less than \$10,000 that is divided equally among the children or apportioned as the court directs.

(ii) **Statutory Spousal Allowance**

In addition to the Child Allowance, Illinois also provides a surviving spouse with a “Spousal Allowance.” The Probate Act provides that the surviving spouse of a deceased resident of Illinois whose estate, whether testate or intestate, is administered in Illinois, shall be allowed as the surviving spouse’s own property a sum of money as the court deems reasonable for the proper support of the surviving spouse for the period of nine (9) months after the death of the decedent in a manner suited to the condition in life of the surviving spouse and to the condition of the estate. 755 ILCS 5/15-1(a). Case law generally holds that the statutory spouse’s award is not restricted to the bare necessities of life, but rather provides for a sum of money that will allow the surviving spouse to live for the nine month statutory period after the death of his or her spouse in the manner to which the surviving spouse has been accustomed. Meyers v. Meyers, 113 Ill. App. 3d 886, 446 N.E.2d 892 (2d Dist. 1983). The purpose of the statutory spouse's award is intended to cover the urgent and immediate needs of a widow or widower for the period immediately following the death of his or her spouse and to help alleviate the widow’s problems by removing as many of her financial worries as possible during this “difficult period.” Id.

Again, the surviving spouse is entitled to an additional sum as the court deems reasonable for the support of minor and adult dependent children of the decedent who reside with the surviving spouse at the time of the decedent's death, during the nine month term. 755 ILCS 5/15-1(a). The spousal award is not to be less than \$10,000, together with an additional sum not less than \$5,000 for each minor or adult dependent child. Id.

The statute provides that the award is to be paid to the surviving spouse at a specific time or times, not exceeding three installments, as the court directs. Id. Additionally, if the surviving spouse dies before the award for his or her support is paid in full, the unpaid amount is to be paid to his or her estate. Id. If the surviving spouse dies or abandons a child before the award for the support of a child is paid in full, the unpaid amount is to be paid for the benefit of the child to whomever the court directs. Id.

Last, the spousal award is exempt from enforcement of a judgment, garnishment or attachment in the possession of the representative. Id.

The surviving spouse is entitled to the award unless the will of the decedent expressly provides that the provisions of the will for the surviving spouse are in lieu of the award and the surviving spouse does not renounce the will. Id.

The statute goes on to provide that the surviving spouse is entitled to receive the amount of the award in money or, at the election of the surviving spouse, to accept payment thereof in whole or in part in goods and chattels of the decedent not specifically bequeathed, at their appraised value. 755 ILCS 5/15-4(a). The selection must be made in writing and filed with the court by the surviving spouse within 30 days after he or she is notified in writing of the allowance of the award. Id. Similarly, if the decedent leaves no surviving spouse, the children of the decedent have the same right of selection of goods and chattels as the surviving spouse (as part of the “Child’s Allowance”). 755 ILCS 5/15-4(b).

The representative must apply to the court to make the award when an award is allowable and not otherwise waived or barred. 755 ILCS 5/15-3(a). If the representative fails to do so, the person entitled to the award may also apply for it. In an independent administration, the independent representative may pay the minimum amount of surviving spouse’s and child’s award without application to the court. 755 ILCS 5/28-7(a). The independent representative may also pay an increased award without application to the court up to five percent (5%) of the gross value of the estate at the date of the decedent’s death. Id.

The court may hear evidence and may increase or diminish the award, but the court may also make an award without hearing any evidence. 755 ILCS 5/15-3(b), see Estate of Venturelli, 54 Ill. App. 3d 997, 370 N.E.2d 290 (1977). In determining the spousal award the court may consider nonprobate assets that the surviving spouse has received, such as jointly held property or life insurance proceeds, to help determine the amount necessary for his or her proper support. Estate of Caffrey, 120 Ill. App. 3d 917, 458 N.E.2d 1147 (1983).

The spousal and child's awards are "second class" claims under the Probate Act and come ahead of all other claims except for funeral expenses and estate administration expenses. This places the spousal and child's awards ahead of creditor's claims. Therefore, even when a will leaves everything to a surviving spouse, that spouse will be entitled to his or her spousal award even if creditor's claims equal or exceed the total value of the estate. Additionally, and perhaps most importantly, even when a testator attempts to disinherit a surviving spouse or minor child, the Probate Act will provide at least some support to assist in transitioning after the decedent's death.

**(iii) The Surviving Spouse's Elective Share**

In addition to the Spousal Allowance, the Illinois Probate Act provides the right for a surviving spouse to renounce the will of his or her spouse and take a statutory forced share. The Probate Act, 755 ILCS 5/2-8(a), provides as follows:

If a will is renounced by the testator's surviving spouse, whether or not the will contains any provision for the benefit of the surviving spouse, the surviving spouse is entitled to the following share of the testator's estate after payment of all just claims: 1/3 of the entire estate if the testator leaves a descendant or 1/2 of the entire estate if the testator leaves no descendant.

For a decedent that was a resident of Illinois, this statutory forced share applies to the decedent's personal property and the real property located in Illinois. However, the surviving spouse's elective share only applies to the decedent's probate estate, i.e., property solely in the decedent's name and subject to the jurisdiction of the probate court. Therefore, property held in trust, jointly held property, and property subject to a beneficiary designation, such as life insurance or annuity proceeds, is generally not subject to the spousal election. Moreover, the spouse's elective one-third (1/3) share if the decedent left a descendant, or one-half (1/2) share if there are no descendants, applies to the decedent's "net" probate estate, the estate remaining after payment of all

obligations, including taxes, funeral expenses, and costs of administration. Grant v. First Nat'l Bank, 77 Ill. App. 3d 866, 396 N.E.2d 872 (2 Dist. 1979).

In order to renounce a will, the surviving spouse must file in the court in which the will was admitted to probate a written instrument signed by the surviving spouse and declaring the renunciation, (1) within seven months after the admission of the will to probate, or (2) within such further time allowed by the court if, within seven months after the admission of the will to probate or before the expiration of any extended period, the surviving spouse files a petition setting forth that litigation is pending that affects the share of the surviving spouse in the estate (e.g., a will contest). 755 ILCS 5/2-8(b). The seven month time period in which to file the spousal election (including the additional time provided by court order) is designed to give the surviving spouse ample time in which to determine the nature and extent of the decedent's estate and to make a fully informed decision as whether or not to renounce the will. Generally, a formal renunciation of the will may not be withdrawn, except by leave of a court of equity upon good cause shown. Upon court order, a renunciation may only be withdrawn by the surviving spouse where he or she was mistaken and misapprehended his or her legal rights and the legal effect of the renunciation, and no rights of innocent third parties have been prejudiced. Donovan v. Newman, 409 Ill. 195, 98 N.E.2d 757 (1951).

As mentioned above, the surviving spouse's elective share only applies to a decedent's probate estate. Therefore, property held in trust, jointly held property, property subject to a beneficiary designation is generally not subject to the spousal election. The interesting question becomes, to what extent lifetime transfers of property can be made to defeat the spousal allowance.

The Lifetime Transfer of Property Act, 755 ILCS 25/0.01, et seq., provides that "[a]n otherwise valid transfer of property, in trust or otherwise, by a decedent during his or her lifetime, shall not, in the absence of an intent to defraud, be invalid, in whole or part, on the ground that it is illusory because the decedent retained any power or right with respect to the property." The court in Johnson v. La Grange State Bank, 73 Ill. 2d 342, 383 N.E.2d 185 (1978) summarized the new rules by stating:

[A]n inter vivos transfer of property is valid as against the marital rights of the surviving spouse unless the transaction is tantamount to a fraud as manifested by the absence of donative intent to make a conveyance of a present interest in the property conveyed. Without such an intent the transfer would simply be a sham or merely a colorable or illusory transfer of legal title. *Id.* at 361, 383 N.E.2d at 194.

Johnson involved an ordinary inter vivos trust with all powers and control retained by the grantor. The court noted that the grantor had to exercise her power of control in a fiduciary capacity and other beneficiaries had an interest in the trust. The court held that the trust was valid and was not includable in the decedent's estate in an attempt by the surviving spouse to take a share by renouncing the will.

In Payne v. River Forest State Bank & Trust Co., 81 Ill. App. 3d 1128, 401 N.E.2d 1229 (1st Dist. 1980) the Illinois Appellate Court held that an owner of property has an absolute right to dispose of his or her property during their lifetime in any manner he sees fit, even though the transfer is for the precise purpose of minimizing or defeating the statutory marital interest of his or her spouse in the property transferred or conveyed. Fraud with regard to the spousal election and Lifetime Transfer of Property Act has been construed to mean an absence of donative intent on the transfer of a property interest and not to the presence of an intent to defeat statutory marital rights of a surviving spouse. See Id.

A more recent case has stated that particular facts might show that an otherwise valid inter vivos transfer was in actuality a "sham transaction" and essentially a disposition by will. Mocny v. Schipiour, 257 Ill. App. 3d 291, 630 N.E.2d 87 (1st Dist. 1993). The court held that such a transfer, akin to a disposition by will, is invalid to defeat the statutory marital right of the surviving spouse and assets transferred in this manner are instead considered part of the decedent's estate and are subject to the statutory spousal election by the surviving spouse. See Id.

In sum, the surviving spouse's right to elect to take against the will applies only to the probate estate of the decedent. Although a simple "disinheritance clause" will not

deprive a surviving spouse of the decedent's estate--the surviving spouse is entitled to an allowance from the estate and has the right to renounce the will and take a forced one-third or one-half share--the decedent's probate estate can be significantly diminished by the use of inter vivos trusts, transfers of property into joint tenancy, and other lifetime transfers designed to defeat the spousal election. The Lifetime Transfer of Property Act and case law concerning the spousal election does provide that such transfers will be pulled back into the decedent's estate for purposes of applying the surviving spouse's elective right only where there was an "intent to defraud" the surviving spouse. However, the intent to defraud element has been narrowly construed and rarely even applies where the intent is to actually defeat the spousal election. Instead, Illinois' courts have taken the position that intent to defraud relates to the absence of a donative intent. Only where facts exist to prove that there was a secret or tacit understanding that a grantor retained complete ownership have the courts been willing to apply the "sham transaction" doctrine with regard to the surviving spouse's elective share.

## **2. In Terrorem or "No-Contest" Clauses**

An in terrorem or "no-contest" clause is a testamentary provision in a will (or added to a trust instrument) that threatens to dispossess any beneficiary who challenges the terms of the will. In general, conditions in a clause against contesting a will or attempting to set it aside are valid. In re Estate of Wojtalewicz, 93 Ill App. 3d 1061, 418 N.E.2d 418 (1st Dist. 1981). "However, though they may be valid, such clauses are disfavored and are strictly construed to avoid forfeiture." In re Estate of Mank, 298 Ill. App. 3d 821, 825, 699 N.E.2d 1103, 1107 (1st Dist. 1998). Both cases held that the in terrorem clause in issue, although valid and violated, were nevertheless unenforceable as violations against law and public policy.

A typical in terrorem clause provides that:

If any person beneficially interested in this Will/Trust shall enter into an agreement to, commence, or except as required by law, participate in any proceeding to:

(a) contest the validity of this Trust Agreement or any part thereof; (b) contest the validity of my will or any part thereof; or (c) assert any claim based on an alleged agreement to make a will or trust agreement or otherwise dispose of my estate or any part thereof, then such beneficiary and all of his or her descendants shall forfeit whatever interest he would have taken under this Will/Trust and my estate shall be administered and distributed as though said person had predeceased me.

A no-contest clause may be a useful tool if a client is concerned that because he or she may be in diminishing health or there is some family discord, that someone may challenge his or her estate plan. However, given the Illinois courts' disposition to strict construction of *terrorem* clauses, it appears that their use is not having the intended effect of discouraging would-be challengers to proceed to litigation. To make things even less clear, the court in In re Estate of Mank stated that the court should look beyond the language of the clause and the parties' conduct and instead focus on "whether, under the particular facts and circumstances of this case, application of the clause to the conduct would be contrary to the law or to the public policy in Illinois." Mank, 298 I. App. 3d at 826, 699 N.E.2d at 1107. Indeed, the court almost always will find a particular no-contest clause to violate Illinois public policy.

Therefore, although *in terrorem* or no-contest clauses are valid in Illinois, they are strictly construed and very rarely enforced. Courts seemingly go out of their way in order to find the clause violative of public policy and, therefore, unenforceable against a contesting party. However, their use may still provide a deterrent to would-be challengers. For example, a client might consider leaving heirs just enough so that they receive a meaningful amount, so that the potential forfeiture will have an impact upon his or her decision not to challenge a will or trust agreement.

## **F. Other Important Will Provisions**

The initial paragraph, or exordium clause, of a will serves the primary purpose of properly identifying the testator. The testator's formal, legal name should be used and nicknames or variations should be avoided. However, there are instances where the testator's legal name differs from the name in which he or she owns property, in those cases, reference should be made to his or her other names.

This initial paragraph should also state the testator's current address in order to establish his or her domicile. This is critical where a testator owns property in several states. For example, a testator may spend his summers in one state and winters in another. In this situation, it is recommended to specify which domicile is to be used upon the testator's death. This may also serve as evidence of the testator's intent for purposes of jurisdiction before a probate court or tax authority.

The initial paragraph should also contain a declaration that the document is the testator's last will and testament and a statement revoking all prior wills and codicils.

It is not required to identify all family members in the initial paragraph. However, a second, definitional paragraph setting out the testator's marital status and identifying family members is important especially in circumstances where there is a second marriage or other complex family situation. One illustration of when it would be important to name family members is a disinheritance clause. Per 755 ILCS 5/4-10, unless it appears by the will that the testator's intent was to disinherit the child, the child is entitled to receive a portion of the testator's estate to which he would be entitled if the testator died intestate. Stating the child's name in a disinheritance clause establishes the testator's intent to disinherit the child and negates a claim that the child was merely "forgotten" in drafting the will. Although it is not necessary to state a reason for disinheriting an individual, it serves as an explanation to the disinherited heir and could serve as evidence of the testator's intent if the disinherited heir files a will contest.

A will should also contain a provision for payments and debts. This clause should address the executor's responsibility to satisfy the testator's debts and what assets of the estate should be utilized to do so prior to distributing estate assets. Unless provided in a

will, all real and personal property and income derived therefrom during administration of the estate, without distinction, can be used to pay the claims, expenses of administration, and taxes of the estate. 755 ILCS 5/18-14. An executor shall pay from the testator's estate, all claims that are entitled to be paid, based on their classification pursuant to 755 ILCS 5/18-10. 755 ILCS 5/18-13. For purposes of the Probate Act, a claim includes any cause of action. 755 ILCS 5/1-2.05. If an estate cannot pay the claims in any one class, the claims in that class shall be paid pro rata. Id.

The will provision regarding payment of taxes, both state and federal, requires careful consideration. One will want to examine that total value of the estate, the type of assets in the estate, outside probate transfers, and the applicable state and federal estate tax when advising a client. Although frequently used, a tax payment clause that provides for the federal and state estate tax to be paid from the residuary may not be in the client's best interest. There is a possibility that the residuary could be exhausted and thus no distribution could be made to residuary beneficiaries. It might be better for certain clients to use a tax clause that places the tax responsibility on the beneficiary that receives the property.

Another expense to consider when drafting a will is that of ancillary administration. The testator should consider whether the expenses of ancillary administration should be paid from the assets held in that particular state or paid from the domiciliary estate. Addressing this situation in the will eliminates the possibility of having to sell ancillary property to satisfy these expenses when there are no liquid assets in the ancillary jurisdiction or seeking contribution from the devisees. In cases of an ancillary estate and the ancillary jurisdiction will tax the property, the will should state whether the ancillary or domiciliary estate will pay that tax.

A will should also include a provision addressing lapse. In the event that no provision is made with regard to the possibility of a devisee predeceasing the testator, 755 ILCS 5/4-11 controls. In the event the statute controls, when a devisee predeceases the testator, and that devisee is a descendant of the testator, the interest then passes to the living descendants of the deceased devisee per stirpes. When a testator makes a devise to

a class, the surviving members of the class would take the share of the member that predeceased the testator. However, if the predeceased class member is a descendant of the testator, the living descendants of the deceased class member will take his share per stirpes. In the event that the statute's provisions are favorable to the client's situation, it is always advisable to include the specific language in the client's will.

A common disaster provision in a client's will usually is drafted in two ways. A survivorship clause provides that the right to take under the will is subject to the beneficiary's survival for a stipulated amount of time (usually, thirty (30) days). The other common disaster clause states that a beneficiary is presumed to have predeceased the testator if both die as a result of a common disaster or accident. If no provision were made in the will, the state's Simultaneous Death statute (755 ILCS 5/3-1 et. seq.) would control.

Standard provisions in a will include bond and court supervision clauses. One should always specify if the executor is to serve with a bond and surety, and if so, how much the amount of the bond, or if executor may serve with no bond or surety. Pursuant to 755 ILCS 5/12-4, a resident executor will not be required to give bond and surety if he is excused from doing so by the will. However, if the court, on its own notion or by suggestion of an interested party, has reason to believe the executor to be involved in fraud, incompetent, or that the estate may not be sufficient to satisfy all of the claims against it, may then order the executor to give bond. Id. The court may in its discretion request bond of a nonresident executor.

A will should assert if court supervision is required during the administration of the estate, i.e. if the estate will be supervised or unsupervised. Although unsupervised administration is less formal and less expensive for the estate, there are circumstances where supervised administration may be advisable to the client. If beneficiaries are expected to contest the will or family circumstances are confrontational, court supervised administration of an estate may be suitable.

Clauses for the disposition of particular items of property should be carefully drafted. In situations where a testator wants to make specific bequests of personal items,

be sure the items are precisely identified to avoid confusion or arguments. There are situations where a broad clause devising personal property to the spouse and alternately to the testator's children is appropriate. If an estate cannot pay all legacies under a will, specific legacies shall be satisfied pro rata before general legacies, and general legacies will then be satisfied pro rata without priority between real and personal property unless provided for in a will. 755 ILCS 5/24-3(b).

After all specific devises are drafted, a residuary clause should be drafted disposing of all the remaining property the testator has an interest in that was not disposed of in a previous clause. When drafting a pour-over will in conjunction with a trust document, prepare a clause that specifically states which property is to be transferred into the trust.

Another issue when drafting a will is whether a gift to a beneficiary, given during the testator's lifetime, is an advancement of his share under a will. The Illinois statute regarding advancements is written in terms of intestacy. A gift is not an advancement of a beneficiaries share unless it is expressed in writing by the decedent or unless acknowledged in writing by the person that received the gift. 755 ILCS 5/2-5(a). A testator may choose to acknowledge in his will a gift made to a beneficiary as an advancement of that beneficiary's inheritance. If a client decides to claim a gift as an advancement, it is best to use specific language stating the gift was an advancement and to state the value of the gift, so it can be deducted from the rest of that beneficiary's inheritance.

## G. Practical Pointers With Sample Forms

### WILL OF [CLIENT]

I, [CLIENT], of \_\_\_\_\_, Illinois, make this my Will and revoke all prior wills and codicils.

#### Article 1

##### Introduction

1.1 My Family. My “spouse” is \_\_\_\_\_. I have \_\_\_\_\_ children now living, namely \_\_\_\_\_. I intend by this Will to provide for all my children, including any born or adopted in the future.

1.2 Guardian. I name as personal fiduciary for and as guardian of the person and estate of any minor child of mine the first of the following who is from time to time willing and able to act:

- (a) my spouse;
- (b) \_\_\_\_\_;
- (c) \_\_\_\_\_.

I authorize the individual nominated above to remove any minor child of mine and the child’s estate to the individual’s place of residence, even if that place of residence is outside the State of Illinois, in order to seek appointment as guardian by the court of that place of residence in any of the foregoing capacities. The inability of an individual nominated above to serve in one or more of the foregoing capacities because of the

individual's place of residence shall not affect the right of the individual to serve in the other foregoing capacity or capacities. If I have more than one minor child, I desire that my minor children not be separated and the same individual be appointed guardian of the person for all my minor children. No security, surety, or bond shall be required of any guardian.

## Article 2

### Gifts on My Death

2.1 Gifts of Tangible Personal Property. I give all of my tangible personal property to my spouse, if my spouse survives me, or if my spouse does not survive me, in shares of equal value to my children who survive me (to the exclusion of the descendants of any child who does not survive me), to be divided among them as they agree or, if they cannot agree within 60 days after my death, as my executor determines. The term "tangible personal property" means all personal and household effects, jewelry, automobiles, collections, and other tangible personal property that I own at my death (including insurance thereon but excluding business use property, precious metals, and unset gems).

2.2 Gifts if Spouse Survives. If my spouse survives me, then I make the following gifts:

(a) Family Trust. I give the tax-sheltered gift to the trustee to hold as the Family Trust.

(b) Marital Trust. I give the balance of my estate to the trustee to hold as the Marital Trust.

2.3 Gifts if Spouse Does Not Survive. If my spouse does not survive me, then I make the following gifts:

(a) Any Child Under Age 25. If there is a surviving child of mine under age 25 at my death, I give the balance of my estate to the trustee to hold as the Children's Single Fund Trust; or

(b) No Child Under Age 25. If there is no surviving child of mine under age 25 at my death, I give the balance of my estate to the trustee to allocate in shares of equal value for my surviving children, subject to the Child's Separate Trust withholding provisions, provided that if a child of mine predeceases me but a descendant of the child survives me, the trustee shall distribute the share that would have been allocated for the deceased child, if living, per stirpes to the child's descendants who survive me.

2.4 Survivorship. Only persons, other than my spouse, living on the 30th day after the day of my death shall be deemed to have survived me for purposes of this Article. My spouse [shall] [shall not] be deemed to have survived me if the order of our deaths cannot be proved.

[CAUTION: You must choose "shall" or "shall not" in the preceding paragraph, and each spouse's document should be different.]

### Article 3

#### Marital Trust

The trustee shall administer the Marital Trust as follows:

3.1 Mandatory Payment of Income. Beginning with my death, the trustee shall pay all

the income to my spouse.

3.2 Discretionary Payment of Principal. The trustee may pay to my spouse as much of the principal as the trustee from time to time considers necessary for the health or maintenance in reasonable comfort of my spouse.

3.3 Payment of Death Taxes. On the death of my spouse, unless my spouse directs otherwise by will or revocable trust specifically referring to this instrument, the trustee shall pay the Marital Trust death taxes.

3.4 Power of Appointment at Death. On the death of my spouse, the trustee shall distribute the Marital Trust not required for payment of the Marital Trust death taxes to any one or more of my descendants and their spouses as my spouse appoints by will, specifically referring to this power of appointment.

3.5 Distribution on Termination. On the death of my spouse, the trustee shall distribute the Marital Trust not required for payment of the Marital Trust death taxes and not effectively appointed as follows:

(a) Any Child Under Age 25. If there is a then living child of mine under age 25, to the trustee to hold as the Children's Single Fund Trust; or

(b) No Child Under Age 25. If there is no then living child of mine under age 25, to the trustee to allocate in shares of equal value for my then living children, subject to the Child's Separate Trust withholding provisions, provided that if a child of mine is not then living but a descendant of the child is then living, the trustee shall distribute the share that would have been allocated for the deceased child, if living, per stirpes to the child's then living descendants.

Article 4  
Family Trust

The trustee shall administer the Family Trust as follows:

4.1 Mandatory Payment of Income. Beginning with my death, the trustee shall pay all the income to my spouse.

4.2 Discretionary Payment of Principal. The trustee may pay to my spouse as much of the principal as the trustee from time to time considers necessary for the health or maintenance in reasonable comfort of my spouse. I recommend that the trustee make no payment of principal to my spouse if any part of the principal of the Marital Trust is reasonably available for such purposes.

4.3 Lifetime Power of Appointment. During my spouse's life, the trustee shall distribute the Family Trust to any one or more of my descendants and their spouses as my spouse from time to time appoints.

4.4 Power of Appointment at Death. On the death of my spouse, the trustee shall distribute the Family Trust to any one or more of my descendants and their spouses as my spouse appoints by will, specifically referring to this power of appointment.

4.5 Distribution on Termination. On the death of my spouse, the trustee shall distribute the Family Trust not effectively appointed as follows:

(a) Any Child Under Age 25. If there is a then living child of mine under age 25, to the trustee to hold as the Children's Single Fund Trust; or

(b) No Child Under Age 25. If there is no then living child of mine under age 25, to the trustee to allocate in shares of equal value for my then living children, subject to the Child's Separate Trust withholding provisions, provided that if a child of mine is not then living but a descendant of the child is then living, the trustee shall distribute the share that would have been allocated for the deceased child, if living, per stirpes to the child's then living descendants.

## Article 5

### Children's Single Fund Trust

The trustee shall administer the Children's Single Fund Trust as follows:

5.1 Discretionary Payment of Income and Principal. The trustee may pay as much of the income and principal to any one or more of my children and their descendants as the trustee from time to time considers necessary for the health, maintenance in reasonable comfort, or education of each of them. The trustee may make the payments in equal or unequal shares, taking into account the present and prospective needs of those persons. Any income not so paid in each year shall be added to principal at the end of each year.

5.2 Distribution on Termination. When there is no living child of mine under age 25, the trustee shall terminate the Children's Single Fund Trust by allocating it in shares of equal value for my then living children, subject to the Child's Separate Trust withholding provisions, provided that if a child of mine is not then living but a descendant of the child is then living, the trustee shall distribute the share that would have been allocated for the deceased child, if living, per stirpes to the child's then living descendants.

## Article 6

### Child's Separate Trusts

Any trust property allocated for a child of mine subject to the Child's Separate Trust withholding provisions shall be added to or used to fund the principal of a Child's Separate Trust for the child. The trustee shall administer each Child's Separate Trust as follows:

6.1 Mandatory Payment of Income. The trustee shall pay all the income to the child.

6.2 Discretionary Payment of Principal. The trustee may pay to the child as much of the principal as the trustee from time to time considers necessary for the health, maintenance in reasonable comfort, or education of the child.

6.3 Lifetime Withdrawal of Principal. After the child has attained age \_\_\_\_\_, the trustee shall distribute as much of the principal to the child as the child from time to time requests by written instrument delivered to the trustee during the child's life, not exceeding in the aggregate half in value before the child has attained age \_\_\_\_\_. For purposes of this paragraph, the value of the principal shall be determined as of the time the child first exercises the right to withdraw, plus the value of any subsequent additions as of the time of addition.

6.4 Power of Appointment at Death. On the death of the child, the trustee shall distribute the Child's Separate Trust to any one or more persons, organizations, and the child's estate as the child appoints by will, specifically referring to this power of appointment.

6.5 Distribution on Termination. On the death of the child, the trustee shall distribute the Child's Separate Trust not effectively appointed as follows:

(a) Any Descendant Living. If the child has a descendant then living, per stirpes to

the child's then living descendants; or

(b) No Descendant Living. If the child has no descendant then living but I have a descendant then living, to the trustee to allocate in shares of equal value for my then living children, subject to the Child's Separate Trust withholding provisions, provided that if a child of mine is not then living but a descendant of the child is then living, the trustee shall distribute the share that would have been allocated for the deceased child, if living, per stirpes to the child's then living descendants.

#### Article 7

##### Distribution to Beneficiaries Under Prescribed Age

Any property to be distributed (other than a discretionary payment or a distribution pursuant to a power of appointment) to a beneficiary who is not a child of mine and is under age \_\_\_\_\_ at the time of distribution shall immediately vest in the beneficiary, but the trustee shall retain the property as a separate trust for the beneficiary on the following terms. The trustee may pay to the beneficiary as much of the income and principal as the trustee deems advisable for the beneficiary's health, maintenance in reasonable comfort, education, or best interests. Any income not so paid in each year shall be added to principal at the end of each year. The trustee shall distribute the remaining trust assets to the beneficiary when the beneficiary attains age \_\_\_\_\_ or to the beneficiary's estate if the beneficiary dies prior to receiving the assets. If at the time the trust is created or during the administration of the trust the beneficiary is under age 21, the trustee may terminate the trust and distribute the property to a custodian for the beneficiary under a Uniform Transfers or Gifts to Minors Act.

#### Article 8

##### Contingent Gift Provision

On my death if neither my spouse nor any descendant of mine survives me, or on the death of the last to die of all beneficiaries of any trust (the “termination date”), my estate or any of the trust not otherwise distributable shall be distributed half to my heirs and half to my spouse’s heirs. Heirs and their respective shares shall be determined under the laws of descent and distribution of Illinois at my death for property located in Illinois as if my spouse and I had each died on the termination date unmarried and domiciled in Illinois.

## Article 9

### Executor

9.1 Executor. I name as my executor the first of the following who is from time to time willing and able to act:

(a) my spouse;

(b) \_\_\_\_\_;

(c) \_\_\_\_\_.

9.2 Waiver of Surety. No security, surety, or bond shall be required of my executor. If permitted by law and if not inconsistent with the best interests of the beneficiaries as determined by my executor, the administration of my estate shall be independent of the supervision of any court.

9.3 Executor Powers. I give to my executor, with respect to my estate, all the powers, authorities, discretions, and immunities granted to the trustee with respect to the trusts under this instrument, to be exercised without authorization from any court, except, as to

property subject to administration outside the state of my domicile, only with the approval of my domiciliary executor.

9.4 Disclaimers. I give to my executor the power to disclaim any property or interest on my behalf without court approval.

9.5 Determinations by Executor. My executor's reasonable determination of any question of fact shall bind all persons.

9.6 Exoneration of Executor. Any individual executor acting in good faith shall not be liable for any act or omission. No executor shall be liable for any act or omission of another executor.

9.7 Special Executor. If my executor (the "principal executor") is unable or unwilling to act as executor as to any property, such person or qualified corporation as the principal executor shall designate by signed instrument shall act as special executor as to that property. Any special executor may resign at any time by giving written notice to the principal executor. The special executor shall have the powers granted to the principal executor under this instrument, to be exercised with the approval of the principal executor. Net income and any proceeds of sale shall be paid to the principal executor, to be administered under this instrument. The principal executor may remove and replace the special executor at any time.

## Article 10

### Trustee

10.1 Appointment of Trustee. My spouse shall be the trustee of each trust created under this instrument.

10.2 Resignation. A trustee may resign at any time by signed notice to the co-trustees, if any, and to the income beneficiaries.

10.3 Individual Trustee Succession. Each acting individual trustee (unless limited in the instrument in which the trustee was designated) may, by signed instrument filed with the trust records, (a) designate one or more individuals or qualified corporations to act with or to succeed the trustee consecutively or concurrently, in any stated combination and on any stated contingency, and (b) amend or revoke the designation before the designated trustee begins to act.

10.4 Default of Designation. If at any time no trustee is acting and no designated trustee is able and willing to act, then the first of the following who is able and willing to act shall be trustee:

(a) \_\_\_\_\_;

(b) \_\_\_\_\_;

(c) \_\_\_\_\_;

(d) Any individual or qualified corporation appointed in an instrument signed by a majority of the income beneficiaries.

10.5 Corporate Trustee Substitution. A corporate trustee may be removed at any time by an instrument signed by a majority of the income beneficiaries but only if, on or before the effective date of removal, a qualified corporation has been appointed corporate trustee in the same manner.

## Article 11

### Trustee Actions

11.1 Control. Except as otherwise provided, whenever more than one trustee is acting, the “trustee” means all trustees collectively, and a majority of the trustees qualified to participate in an action or decision of the trustees shall control. Any trustee who is not qualified to participate in or dissents from such action or decision shall not be liable therefor.

11.2 Accountings. Upon written request, the trustee shall send a written account of all trust receipts, disbursements, and transactions and the property comprising the trust to each income beneficiary and, at the option of the trustee, to the future beneficiaries of the trust. A “future beneficiary” of a trust is a person to whom the assets of the trust would be distributed or distributable if the trust then terminated. Unless court proceedings on the account are commenced within three months after the account is sent, the account shall bind and be deemed approved by all of the following beneficiaries who have not filed written objections to the account with the trustee within three months after the account is sent, and the trustee shall be deemed released by all such beneficiaries from liability for all matters covered by the account as though such account was approved by a court of competent jurisdiction: (a) each beneficiary to whom the account was sent and (b) if the account was sent to all income and future beneficiaries of the trust, then all beneficiaries of the trust who have any past, present, or future interest in the matters covered by the account.

11.3 Trustee’s Right to Account Settlement Before Distribution. Before distribution of any trust principal, the trustee shall have the right to require settlement of any open accounts of the trust from which the distribution is being made, either by the written approval and release of all beneficiaries having an interest in the distribution or, if the releases cannot be obtained, by court settlement of the open accounts. All the trustee’s

reasonable fees and expenses (including attorneys' fees) attributable to approval of the trustee's accounts shall be paid by the trust involved.

11.4 Acceptance of Predecessor's Accounts. On the signed direction of the income beneficiaries, the trustee shall accept without examination the accounts rendered and property delivered by or for a predecessor trustee or my executor. Such acceptance shall fully discharge the predecessor trustee or my executor and shall bind all beneficiaries.

11.5 Notice. If a beneficiary is under legal disability, the trustee shall give any notice or accounting to the beneficiary's personal representative, if any, and if none, to a parent of the beneficiary, if any, and if none, to any person who the trustee believes has demonstrated concern for the interest of the beneficiary. That person may sign any instrument for the beneficiary.

11.6 Special Trustees. If the trustee (the "principal trustee") is unable or unwilling to act as trustee as to any property, such person or qualified corporation as the principal trustee shall designate by signed instrument shall act as special trustee as to that property. Any special trustee may resign at any time by giving written notice to the principal trustee. The special trustee shall have the powers granted to the principal trustee under this instrument, to be exercised with the approval of the principal trustee. Net income and any proceeds of sale shall be paid to the principal trustee, to be administered under this instrument. The principal trustee may remove and replace the special trustee at any time.

11.7 Delegation to Co-Trustee. Any individual trustee may delegate any or all of that trustee's powers and duties to a co-trustee, except that no trustee shall be permitted to delegate any discretion with respect to the distribution of income or principal to a beneficiary. Any delegation may be for a definite or indefinite period and may be revoked by the delegating trustee. Any delegation or revocation shall be in writing, signed by the delegating trustee, and delivered to the co-trustee to whom the delegation is

made. Any person or institution may rely on the written certification of a co-trustee that the co-trustee has the power to act without concurrence of any other trustee, provided, however, that the co-trustee shall attach to the written certification a copy of the instrument by which the powers and duties have been delegated.

11.8 Compensation. The trustee shall be entitled to reimbursement for expenses and to reasonable compensation.

11.9 Determinations by Trustee. The trustee's reasonable determination of any question of fact shall bind all persons.

11.10 Third-Party Dealings. The trustee's certification that the trustee is acting according to this instrument shall protect anyone dealing with the trustee. No one need see to the application of money paid or property delivered to the trustee.

11.11 Exoneration of Trustee. Any individual trustee acting in good faith shall not be liable for any act or omission. No trustee shall be liable for any act or omission of another trustee.

11.12 Bond. No trustee need give bond to, qualify before, or account to any court.

11.13 Powers of Successor Trustee. Unless expressly limited, each successor trustee shall have all the titles, powers, duties, discretions, and immunities of the original trustee.

## Article 12

### Trustee Powers

In addition to all powers granted by law, the trustee shall have the following powers,

to be exercised in a fiduciary capacity:

12.1 Retention. To retain any property transferred to the trustee, regardless of diversification and regardless of whether the property would be considered a proper trust investment;

12.2 Sale. To sell at public or private sale, contract to sell, grant options to buy, convey, transfer, exchange, or partition any real or personal property of the trust for such price and on such terms as the trustee sees fit;

12.3 Real and Tangible Personal Property. To make leases and subleases and grant options to lease, although the terms thereof commence in the future or extend beyond the termination of any trust; to purchase, operate, maintain, improve, rehabilitate, alter, demolish, abandon, release, or dedicate any real or tangible personal property; and to develop or subdivide real property, grant easements, and take any other action with respect to real or tangible personal property that an individual owner thereof could take;

12.4 Borrowing. To borrow money from any lender, extend or renew any existing indebtedness, and mortgage or pledge any property in the trust;

12.5 Investing. To invest in bonds, common or preferred stocks, notes, options, common trust funds, mutual funds, shares of any investment company or trust or other securities, life insurance, partnership interests, general or limited, limited liability company interests, joint ventures, real estate, or other property of any kind, regardless of diversification and regardless of whether the property would be considered a proper trust investment;

12.6 Joint Investments; Distribution; Determination of Value. To make joint investments for two or more trusts held by the same trustee; to distribute property in cash

or in kind, or partly in each; and to allocate or distribute undivided interests, different property, or disproportionate interests to the beneficiaries, and to determine the value of any property so allocated or distributed; but no adjustment shall be made to compensate for a disproportionate allocation of unrealized gain for federal income tax purposes, and no action taken by the trustee pursuant to this paragraph shall be subject to question by any beneficiary;

12.7 Rights as to Securities. To have all the rights, powers, and privileges of an owner of the securities held in trust, including, but not limited to, the powers to vote, give proxies, and pay assessments and to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations and, incident to such participation, to exercise or sell stock subscription or conversion rights;

12.8 Conservation of Assets. To take any action that an individual owner of an asset could take to conserve or realize the value of the asset and with respect to any foreclosure, reorganization, or other change with respect to the asset;

12.9 Delegation. To employ agents, attorneys, and proxies of all types (including any firm in which a relative of mine or his or her spouse is a partner, associate, or employee or is otherwise affiliated) and to delegate to them any powers the trustee considers advisable;

12.10 Payment of Expenses and Taxes. To pay all expenses incurred in the administration of the trust and to pay all taxes imposed on the trust;

12.11 Determination of Principal and Income. To determine in cases not covered by statute the allocation of receipts and disbursements between income and principal, except that (a) if the trust is beneficiary or owner of an individual account in any employee benefit plan or individual retirement plan, income earned after death in the account shall

be income of the trust, and if the trustee is required to pay all trust income to a beneficiary, the trustee shall collect and pay the income of the account to the beneficiary at least quarterly (and to the extent that all income cannot be collected from the account, the deficiency shall be paid from the principal of the trust); (b) reasonable reserves for depreciation, depletion, and obsolescence may be established out of income and credited to principal only to the extent that the trustee determines that readily marketable assets in the principal of the trust will be insufficient for any renovation, major repair, improvement, or replacement of trust property that the trustee deems advisable; and (c) any premium paid for interest-bearing debt obligations shall be amortized as an income expense;

12.12 Dealings with Fiduciaries. To deal with, purchase assets from, or make loans to the fiduciary of any trust made by me or a trust or estate in which any beneficiary under this trust has an interest, even though a trustee under this instrument is the fiduciary, and to retain any assets or loans so acquired, regardless of diversification and regardless of whether the property would be considered a proper trust investment; to deal with a corporate trustee under this instrument individually or a parent or affiliate company; and to deal with the fiduciary of any other estate, trust, or custodial account even though the fiduciary is a trustee under this instrument;

12.13 Compromising Claims. To litigate, compromise, settle, or abandon any claim or demand in favor of or against the trust;

12.14 Nominee Arrangements. To hold any asset in the name of a nominee, in bearer form or otherwise, without disclosure of any fiduciary relationship;

12.15 Elections Under Retirement Plans. To elect, pursuant to the terms of any employee benefit plan, individual retirement plan, or insurance contract, the mode of distribution of the proceeds thereof, or change the beneficial ownership, and no

adjustment shall be made in the interests of the beneficiaries to compensate for the effect of the election or change;

12.16 Liability Insurance. To purchase liability and casualty insurance of any kind for the protection of the trust estate, including comprehensive liability insurance;

12.17 Accepting Additional Property. To accept additional property from any source and administer it as a part of the trust and, if the addition is made by a will, to accept the statement of the personal representative of the estate of the transferor that the property delivered to the trustee constitutes all of the property to which the trustee is entitled without any duty to inquire into such representative's administration or accounting;

12.18 Environmental Matters. To inspect and monitor businesses and real property (whether held directly or through a partnership, corporation, trust, or other entity) for environmental conditions or possible violations of environmental laws; to remediate environmentally damaged property or to take steps to prevent environmental damage in the future, even if no action by public or private parties is currently pending or threatened; to abandon or refuse to accept property that may have environmental damage; and to expend trust property to do the foregoing; and no action or failure to act by the trustee pursuant to this paragraph shall be subject to question by any beneficiary;

12.19 Qualified Conservation Easements. To create, on land meeting the requirements of Code §2031(c)(8)(A), a qualified conservation easement, as defined in Code §2031(c)(8)(B), with or without the consent of any beneficiary, and to make the election provided in Code §2031(c)(6); and

12.20 Ability To Take Other Actions. To do all other acts to accomplish the proper management, investment, and distribution of the trust.

## Article 13

### Administrative Provisions

13.1 Income Payments. Mandatory income payments shall be made at least quarterly.

13.2 Standard for Discretionary Payments. In the exercise of discretion to make a payment to a beneficiary, the trustee may consider all income and resources known to the trustee to be available to the beneficiary and the standard of living of the beneficiary.

13.3 Exercise of Power of Appointment. A lifetime power of appointment granted under this instrument may be exercised only by written instrument specifically referring to the power. A testamentary power of appointment granted under this instrument may be exercised only by a will specifically referring to the power. The appointment may be either outright or subject to such trusts and conditions as the holder of the power designates. The holder of the power may grant to any person to whom principal may be appointed further powers of appointment. In determining whether a testamentary power of appointment has been exercised, the trustee may rely on an instrument admitted to probate in any jurisdiction as the will of the holder of the power or may assume the power of appointment was not exercised in the absence of actual notice of the holder's will within three months after the holder's death.

13.4 Discretionary Qualified Terminable Interest Property Election. The trustee may elect (and may direct my executor to elect) to treat any fraction or all of the Marital Trust as qualified terminable interest property for federal estate tax purposes.

13.5 Marital Deduction Qualification. I intend the Marital Trust to qualify for the federal estate tax marital deduction to the extent a qualifying election is made, and the provisions of this instrument shall be so construed. To the extent a provision of this instrument would result in the Marital Trust not so qualifying, that provision shall be

ineffective. Despite anything to the contrary, if my spouse directs in writing, the trustee of the Marital Trust shall convert unproductive property into property that produces a reasonable rate of income.

13.6 Effect of Disclaimer of Marital Trust. To the extent the Marital Trust is disclaimed by or on behalf of my spouse, the disclaimed portion shall be held as a Disclaimer Trust and administered under the same terms as the Family Trust, except that my spouse shall have no power of appointment over the Disclaimer Trust.

13.7 Marital Trust Death Taxes. Unless my spouse directs otherwise by will or revocable trust specifically referring to this instrument, after the death of my spouse the trustee shall pay from the portion of the Marital Trust included in my spouse's gross estate its proportionate share of the aggregate amount by which the death taxes in my spouse's estate are increased as a result of the inclusion in my spouse's taxable estate of the Marital Trust and any other trust that has qualified for the federal gift or estate tax marital deduction (the "Marital Trust death taxes").

13.8 No Advancements. No payment made to any beneficiary under this instrument shall be treated as an advancement.

13.9 Allocation of Assets and Income. For purposes of funding any pecuniary gifts (including any pecuniary formula gifts), the trustee may allocate or distribute assets in any manner, but the trustee shall value each asset at its fair market value on the date on which the asset is allocated or distributed. Any pecuniary gift (including any pecuniary formula gift) in trust or to my spouse shall include a pro rata share of the income of the trust estate from the date of my death to the date or dates of distribution.

13.10 Small Trust Termination. The trustee may terminate any trust with a value at the time of termination less than the Minimum Trust Value. This power may not be

exercised by a trustee who is a beneficiary of the trust. The Minimum Trust Value shall be the sum of (a) \$100,000 and (b) the percentage increase, if any, in the cost of living from January 1 of the year in which I executed this instrument until January 1 of the year of termination multiplied by \$100,000. For this purpose, the increase in the cost of living shall be determined pursuant to the Consumer Price Index for Urban Wage Earners and Clerical Workers, U.S. City Average, All Items, as published by the Bureau of Labor Statistics of the U.S. Department of Labor. If that index ceases to be published, there shall be substituted any other index the trustee determines to reflect similar information. Distribution under this paragraph shall be to the income beneficiaries in the proportions in which they are entitled to share the income or, if their interests are indefinite, to the income beneficiaries in equal shares.

13.11 No Rule Against Perpetuities. I intend that each trust established under this instrument shall be a Qualified Perpetual Trust under Illinois law and shall not be subject to the Rule Against Perpetuities. The power of the trustee to sell, lease, or mortgage assets shall be construed as enabling the trustee to sell, lease, or mortgage trust property for any period beyond the Rule Against Perpetuities. If assets that would not qualify as part of a Qualified Perpetual Trust would otherwise be added to any trust established under this instrument, the trustee shall segregate those assets and administer them as a separate trust identical to the one to which the assets would have been added, except that, despite any other provision, 21 years after the death of the last to die of all of the beneficiaries living at my death each such separate trust then held under this instrument shall be distributed to the income beneficiaries in the proportions in which they are entitled to share the income, or, if their interests are indefinite, to the income beneficiaries in equal shares.

13.12 Facility of Payment. The trustee may make any payments (other than distributions on termination) to a beneficiary under legal disability or whom the trustee determines to be unable to properly manage his or her affairs in any of the following

ways: (a) to the legally appointed guardian of the beneficiary, (b) to an adult relative or friend of the beneficiary in reimbursement for proper expenditures on behalf of the beneficiary, (c) to a custodian for the beneficiary under a Uniform Transfers or Gifts to Minors Act, (d) by making direct expenditures for the benefit of the beneficiary, or (e) to the beneficiary directly. The executor may make distributions of tangible personal property to a beneficiary under legal disability or whom the executor determines to be unable to properly manage his or her affairs in any of the ways listed in (a), (c), or (e) above.

13.13 Spendthrift. No interest under this instrument shall be assignable by any beneficiary or be subject to the claims of his or her creditors, including claims for alimony or separate maintenance. The preceding sentence shall not be construed as restricting in any way the exercise of any right of withdrawal or power of appointment or the ability of any beneficiary to release his or her interest.

13.14 Consolidation and Division of Trusts. The trustee may at any time consolidate any trust held under this instrument with any other trust if the beneficiaries of the trusts are the same and the terms of the trusts are substantially similar. Further, the trustee, in the trustee's absolute discretion, may divide a trust (the "initial trust") into two or more separate trusts and may segregate an addition to a trust (the "initial trust") as a separate trust.

(a) Funding. In dividing the initial trust, if the division is to be effective as of my death or as of the death of any other person, the trustee shall fund each separate trust with property having an aggregate fair market value fairly representative of the appreciation or depreciation in value from the date of such death to the date of division of all property subject to the division.

(b) Terms. A trust created pursuant to this paragraph shall have the same terms and

conditions as the initial trust, and any reference to the initial trust in this instrument shall refer to the trust. The rights of beneficiaries shall be determined as if the trust and the initial trust were aggregated, but (1) different tax elections may be made as to the trusts, (2) disproportionate discretionary distributions may be made from the trusts, (3) taxes may be paid disproportionately from the trusts, (4) upon termination the share of a remainder beneficiary (including any recipient trust) may be satisfied with disproportionate distributions from the trusts, and (5) a beneficiary of the trusts may disclaim an interest in one of the trusts without having to disclaim an interest in another trust. In administering, investing, and distributing the assets of the trusts and in making tax elections, the trustee may consider differences in federal tax attributes and all other factors the trustee believes pertinent.

13.15 Accrued and Unpaid Income. On the death of any beneficiary, any accrued or unpaid income shall be paid as income to the next beneficiary succeeding in interest.

13.16 Controlling Law. The validity and effect of each trust and the construction of this instrument and of each trust shall be determined in accordance with the laws of Illinois. The original situs and original place of administration of each trust shall also be Illinois, but the situs and place of administration of any trust may be transferred at any time to any place the trustee determines to be for the best interests of the trust.

13.17 Life Insurance. My executor and the trustee shall take whatever action each considers best to collect the proceeds of any policies then payable to my estate or the trustee, but they need not incur expense or take legal proceedings unless indemnified. Payment to and the receipt of my executor or the trustee shall be a full discharge of the liability of any insurance company, which need not take notice of this instrument or see to the application of any payment.

13.18 Exclusion of Interested Fiduciary. Notwithstanding any other provision, an

individual fiduciary (a) shall have no incident of ownership or power or discretion with respect to any policy of insurance on the fiduciary's life; (b) shall have no discretionary power to allocate or distribute assets to the extent that such would discharge the fiduciary's legal obligation to support any beneficiary; (c) shall, if the fiduciary has a beneficial interest in a trust, have no discretionary power to allocate or distribute assets of the trust, directly or indirectly, to or for any beneficiary (including the fiduciary) unless necessary for the beneficiary's maintenance in reasonable comfort, health care, or education (to the extent the fiduciary was otherwise granted such discretionary powers); and (d) shall have no other power or discretion that would be deemed a general power of appointment under Code §2041 unless the fiduciary has such a power in other than a fiduciary capacity.

#### Article 14

##### Payment of Death Taxes, Expenses, and Debts

14.1 Payments. My executor shall make the following payments:

(a) Death Taxes. All of my death taxes.

(b) Expenses. All expenses of my last illness, funeral, and burial; costs of safeguarding and delivering tangible personal property; and estate administration expenses.

(c) Debts. All of my debts, other than debts secured by life insurance, by an interest in a land trust or cooperative, or by real property.

14.2 Source of Payments Generally. My executor shall make all payments required under this Article from my estate remaining after distribution of any gifts of tangible

personal property or gifts of specific sums of money (including any pecuniary formula gifts), in trust or otherwise. Notwithstanding the preceding sentence:

(a) My executor shall pay from the disclaimed assets the amount by which my death taxes are increased by reason of a disclaimer of any portion of the Marital Trust;

(b) My executor shall pay from the nonqualified assets of the Marital Trust the amount by which my death taxes are increased by reason of an election to qualify less than all of the Marital Trust as qualified terminable interest property, and

(c) My executor shall pay from the disclaimed assets all generation-skipping transfer taxes on direct skips of which I am the transferor occurring at my death as a result of a disclaimer.

14.3 Apportionment and Reimbursement for Death Taxes and Expenses. I do not waive any rights my executor has under Code §§2206, 2207, 2207A, and 2207B or any similar statutes of any state (or any comparable provisions in effect at my death), and I authorize my executor to take such actions as are necessary to obtain reimbursement under those Code sections and statutes, including withholding distributions. I waive all other rights to reimbursement and apportionment.

14.4 Tax Elections. My executor may make elections under tax laws and employee benefit plans and may make allocations of any available GST exemption as my executor deems advisable. No adjustment shall be made between principal and income or in the relative interests of the beneficiaries to compensate for any such election or allocation.

Article 15

Definitions

15.1 Balance of My Estate. The “balance of my estate” means my estate reduced by any payments of expenses, debts, and death taxes required to be paid from my estate and any gifts of specific assets and any pecuniary gifts (including any pecuniary formula gifts).

#### 15.2 Child and Descendant.

(a) Child. A “child” of a person means only (1) a child born to the person or to the person’s spouse while they are lawfully married; (2) a natural child of the person born while the parents are not lawfully married if the parents subsequently become lawfully married, but only for purposes of any allocation or distribution made after that marriage; (3) a child lawfully adopted by the person prior to that child’s attaining age 21; or (4) a natural child of that person if that person is a female.

(b) Descendant. A child of a person is a “descendant” of that person and of all ancestors of that person. A person’s descendants include all such descendants whenever born. Except when distribution or allocation is directed to descendants per stirpes, the word “descendants” includes descendants of every degree whether or not a parent or more remote ancestor of a descendant is also living.

(c) Child in Gestation. A child in gestation on the date any allocation or distribution is to be made shall be deemed to be living on that date if the child is subsequently born alive and lives for at least 90 days.

15.3 Code. References to sections of the “Code” refer to the Internal Revenue Code of 1986, as amended from time to time, and include corresponding provisions of subsequent federal tax laws.

15.4 Death Taxes. “Death taxes” includes all estate, transfer, inheritance, and other succession taxes (including penalties and interest) imposed by reason of death. “Death taxes” shall not include generation-skipping transfer taxes imposed on any generation-skipping transfers other than direct skips made at the decedent’s death of which the decedent is the transferor.

15.5 Education. “Education” means a preschool, grade school, middle school, high school, college, university, and professional or postgraduate education, any vocational studies or training, reasonable related living expenses, and reasonable travel expenses to and from the educational institution.

15.6 Incapacity. A person shall be considered incapacitated if under a legal disability or unable to give prompt and intelligent consideration to financial affairs. The existence of the inability may be determined by a physician, and any person may rely on written notice of the determination. A person already acting as executor or trustee shall cease to act on incapacity.

15.7 Income Beneficiary. An “income beneficiary” means a person to whom or for whose benefit income of any trust is or may be currently distributed.

15.8 Per Stirpes. Whenever assets are to be allocated for or distributed to the descendants of a person “per stirpes,” those assets shall be divided into equal shares, one such share for each then living child of that person and one such share for each deceased child of that person who has a descendant then living. Any such deceased child’s share shall then be allocated for or distributed to that child’s descendants per stirpes in accordance with the preceding sentence and this sentence.

15.9 Qualified Corporation. A “qualified corporation” means any bank, trust company, or other corporate entity that is authorized to act as trustee and that is not a

related or subordinate party under Code §672(c) as to any beneficiary under this instrument.

15.10 Spouse. The “spouse” of any person, other than me, means the individual legally married to, and not legally separated from, that person on the date of the distribution then in question or on the date of the prior death of that person.

15.11 Tax-Sheltered Gift. “Tax-sheltered gift” means:

(a) Any assets that cannot qualify for the federal estate tax marital deduction and that are not disposed of otherwise; and

(b) After giving effect to (a), the largest pecuniary amount that results in no, or the least possible, federal estate tax payable by reason of my death.

In determining the tax-sheltered gift, my executor shall (a) consider any tax referred to in Code §2001(b)(2); (b) consider the applicable credit amount allowable to my estate, any deduction from my estate allowed under Code §2057, and the state death tax credit allowable to my estate (but only to the extent its use would not increase state death taxes), but no other credit; (c) consider my adjusted taxable gifts; (d) consider property passing outside of this instrument that is includible in my gross estate and does not qualify for the marital or charitable deduction; (e) consider other gifts under this instrument that do not qualify for the marital or charitable deduction; (f) consider charges to principal that are not allowed as deductions in computing my federal estate tax; (g) assume that none of the Family Trust qualifies for the federal estate tax marital deduction; and (h) assume that all of the Marital Trust (including any part disclaimed) qualifies for the federal estate tax marital deduction. I recognize that the tax-sheltered gift may be zero, may be reduced by certain state death taxes, and may be affected by any

election not to deduct administration expenses for federal estate tax purposes.

## Article 16

### Spouse's Occupancy of Residential Property in a Trust

The provisions of this Article shall apply if any interest in property that was used by my spouse and me as a residence at the time of my death ("the residence") is allocated to a trust created under this instrument. "Residence" includes a house or condominium (or the beneficial interest in a land trust that holds title to a house or condominium), cooperative apartment, or nursing home or retirement community arrangement, and any fractional interest therein.

16.1 Retention and Use of Residence. I authorize the executor to distribute the residence to a trust created under this instrument and the trustee to retain the residence for my spouse's life notwithstanding that the residence may constitute a large part or all of the principal of the trust and may lack the diversification or productivity ordinarily considered prudent for trust investments. My spouse may continue to use and occupy the residence rent free, provided that my spouse pays all taxes, assessments, insurance premiums, ordinary repair bills, and other expenses of protecting and maintaining the residence. Notwithstanding the preceding sentence, if any expense payable by my spouse pursuant to the preceding sentence would be chargeable against the principal of a trust, the trustee shall distribute to my spouse as much of the principal of the trust as is necessary to reimburse my spouse for payment of that expense, or if requested to do so by my spouse, the trustee shall pay such expense directly from the principal of the trust. As long as my spouse pays expenses as required by the preceding two sentences of this paragraph, the trustee shall not sell the residence except as provided in the following paragraph.

16.2 Sale and Purchase of Residence. Upon my spouse's written request, the trustee shall sell all or any part of the residence for its fair market value and shall retain the proceeds of the sale as principal. Upon my spouse's written request, the trustee shall purchase or construct any new residence my spouse shall request out of the proceeds of any sale under this paragraph and shall thereafter hold the new residence as "the residence" subject to the provisions of this Article. My spouse may at any time purchase the residence from the trustee for its fair market value, determined as of the date my spouse delivers to the trustee a written purchase offer.

16.3 Trustee's Liability. No trustee shall be accountable for any loss sustained by reason of any action taken or omitted pursuant to this Article, and the powers granted under this article shall be exercised only in a fiduciary capacity.

## Article 17

### Captions and Context of Terms

Captions shall have no impact or meaning as to the terms of this instrument. Singular and plural and masculine, feminine, and neuter shall be interchangeable as required or permitted in the context of this instrument.

Signed on \_\_\_\_\_, 20\_\_.

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[CLIENT]

The testator, [CLIENT], signed this Will in our presence on the date it bears. Immediately thereafter, at the testator's request and in the testator's presence and in the

presence of each other, we signed our names as witnesses. We certify that we believed the testator to be of sound mind and memory at the time of signing.

Witnesses

Addresses

\_\_\_\_\_ residing at \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ residing at \_\_\_\_\_

\_\_\_\_\_

\_\_\_\_\_ residing at \_\_\_\_\_

\_\_\_\_\_

## **H. The Proper Execution of a Will in Your State**

The testator and at least two witnesses should be present at the will execution. After the witnesses are in the same room as the testator, the testator should acknowledge that he or she knows his or her heirs and the extent of the property that he or she owns, he or she has read the document before him or her, and the document he or she is about to sign is his or her last will and testament. The testator should then sign the will or direct someone else to sign the will on his or her behalf in the presence of the witnesses. The witnesses then sign the will in the presence of the testator. It is not necessary that the witnesses sign in the same room as the testator as long as the testator can see the witnesses sign the will from his or her location. The aforementioned acts constitute the proper execution of a will in Illinois.

However, it is advisable for the witnesses to sign an attestation clause attesting that the testator was of sound mind and memory, the testator signed or directed someone else to sign the will in the presence of the witnesses, and the witnesses attested the will in the presence of the testator. The attestation clause acts as an affidavit from the witnesses during probate. It essentially makes the will “self-proving,” and the witnesses will not need to attest to the aforementioned items in person before the Probate Court. A notary should witness and sign the attestation clause.